STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

RAYMOND ALLEN MCCULLER,

Defendant-Appellant.
_____/

Supreme Court No. 128161

Court of Appeals No. 250000

Lower Court No. 02-183044FH

OAKLAND COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

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Attorney for Defendant-Appellant

128161

DEFENDANT'APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

STATE APPELLATE DEFENDER OFFICE

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STATEMENT OF JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant Raymond Allen McCuller was convicted of Assault with Intent to do Great Bodily Harm, after a May 8-9, 2003 jury trial in Oakland County Circuit Court, before the Honorable Richard D. Kuhn. On June 17, 2003, the court sentenced Mr. McCuller to two to fifteen years' imprisonment.

Mr. McCuller filed an appeal of right. He first moved for resentencing in the trial court, which was denied. He then appealed to the Court of Appeals. His Brief on Appeal asserted two claims of error: (1) the denial of the right to present a defense when the trial court precluded the introduction of evidence of a prosecution witness' bias and motive to lie; and (2) the unconstitutional enhancement of his sentence based on allegations not proven to the jury. On January 11, 2004, the Court of Appeals affirmed his conviction and sentence in an unpublished per curiam decision.

On March 7, 2005, Mr. McCuller filed an application for leave to appeal the Court of Appeals' decision to this Honorable Court, raising the same two issues presented in that Court.[1] On September 15, 2005, this Court issued an Order holding the application in abeyance pending issuance of a decision in *People v Drohan,* Docket No. 127489. Oral argument was conducted in the *Drohan* case on November 8, 2005. On November 28, 2005, this Court issued an Order scheduling this application for oral argument and ordering the submission of supplemental briefs, "addressing the effect, if any, of *Blakely v Washington,* 542 US 296; 124 SCt 2531; 159 L Ed 2d 403 (2004) on the prison sentence imposed in this case." This is Mr. McCuller's supplemental brief.

[1] With respect the issue raised in Mr. McCuller's original application for leave pertaining to the exclusion of evidence of a witness' bias, Mr. McCuller rests on the argument presented in that pleading.

Based on the jury verdict, Mr. McCuller belongs in an "intermediate sanction" cell of the sentencing guidelines, which (1) compels a legislatively mandated sentence of no more than 11 months in jail, (2) does not permit a prison sentence, and (3) does not involve a so-called indeterminate sentence consisting of a minimum and a maximum sentence. Based on judicial fact-finding, his guidelines were increased to 5 to 28 months, and he was sent to prison for 2 to 15 years. According to the United States Supreme Court decision in *Blakely,* this increase in Mr. McCuller's sentence beyond that which was allowed by his jury verdict violates the Sixth Amendment.

Under these circumstances, Mr. McCuller must be resentenced to a sentence within his proper guidelines of 0 to 11 months, i.e. to an intermediate sanction, which is some form of punishment less than a prison sentence. Mr. McCuller prays that this Honorable Court either remand for resentencing as a matter of peremptory relief, or grant leave to appeal the Court of Appeals' decision and order full briefing on this novel and important jurisprudential question.

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STATEMENT OF QUESTIONS PRESENTED

I. IS MR. MCCULLER ENTITLED TO RESENTENCING WHERE HIS SENTENCE WAS UNCONSTITUTIONALLY ENHANCED ON THE BASIS OF ALLEGATIONS NOT DECIDED BY HIS JURY BEYOND A REASONABLE DOUBT; WHERE HIS MINIMUM SENTENCE CONSTITUTES A DEPARTURE FROM THE SENTENCING GUIDELINES AUTHORIZED BY HIS JURY VERDICT; AND WHERE, UNDER HIS CORRECT GUIDELINES, HE MUST BE GIVEN AN INTERMEDIATE SANCTION SUCH AS PROBATION AND/OR A JAIL SENTENCE?

Court of Appeals answered, "No".

Trial Court answered, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Defendant-Appellant Raymond Allen McCuller relies upon the recitation of material facts and proceedings contained in his original application for leave.

I. MR. MCCULLER IS ENTITLED TO RESENTENCING WHERE HIS SENTENCE WAS UNCONSTITUTIONALLY ENHANCED ON THE BASIS OF ALLEGATIONS NOT DECIDED BY HIS JURY BEYOND A REASONABLE DOUBT; WHERE HIS MINIMUM SENTENCE CONSTITUTES A DEPARTURE FROM THE SENTENCING GUIDELINES AUTHORIZED BY HIS JURY VERDICT; AND WHERE, UNDER HIS CORRECT GUIDELINES, HE MUST BE GIVEN AN INTERMEDIATE SANCTION SUCH AS PROBATION AND/OR A JAIL SENTENCE.

Based on the jury verdict, Mr. McCuller's sentencing guidelines mandated an intermediate sanction, which could include a jail term of up to 11 months, but could not include imprisonment in a state prison.

Mr. McCuller was convicted by a jury of assault with intent to commit great bodily harm. MCL 750.84. Sentencing guidelines for that offense are located on the "D" grid. MCL 777.16d. Based on the jury verdict, and taking into consideration his prior record and his status as a 2nd habitual offender[2], Mr. McCuller belongs in the B-I cell, which mandates a minimum sentence within the range of 0 to 11 months.[3] MCL 777.65, MCL 777.21 (3)(a).

The statutory framework further provides that where, as here, the upper limit of the guidelines range is 18 months or less, the court must impose an intermediate sanction, which can consist of a jail term of no more than the high end of the guidelines or 12 months, whichever is less, or some lesser form of punishment such as probation, but which **cannot consist of a prison sentence**. MCL 769.31 (b), MCL 769.34 (4)(a). This Court fully elaborated on this unique

[2] Mr. McCuller did receive sentencing guidelines points pertaining to his prior record -- namely, 5 points under Prior Record Variable 2 and 5 points under Prior Record Variable 5 -- but these are not in dispute. In addition, because he was charged as a 2nd habitual offender, he belongs in the cell which is appropriate for that status.

aspect of the sentencing guidelines in *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002), where it stated that, "[a]n 'intermediate sanction' can mean a number of things, but it does not include a prison sentence."

Because an intermediate sanction cell requires a flat sentence of no more than 12 months in jail, it is unlike most sentences in Michigan, in that it does not consist of a minimum and a maximum sentence. In the parlance of Michigan sentencing jurisprudence, an intermediate sanction is a determinate sentence, rather than an indeterminate sentence. MCL 769.8 (1); *People v Martin,* 257 Mich App 457; 668 NW2d 397 (2003). A flat sentence of no more than 11 months in jail is the maximum sentence allowed by law for Mr. McCuller. MCL 769.34(4)(a).

As a result of judicial fact finding, Mr. McCuller's sentencing guidelines were increased to 5 to 28 months, and he was given a prison sentence.

Mr. McCuller was given a prison sentence of 2 to 15 years. His 2-year (i.e. 24 month) minimum sentence was premised on guidelines mandating a minimum sentence between 5 and 28 months,[4] which is a "straddle cell."[5] This increase in the guidelines -- from the 0 to 11 months authorized by the jury to the 5 to 28 month range on which his sentence was based -- was grounded on factual findings by the sentencing judge which resulted in assessing the following Offense Variable points: 10 points under Offense Variable 1, for "the victim was touched by any

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[3] Of course, a sentencing judge may depart from the guidelines range for "substantial and compelling reasons," but it has never been asserted that there was any intention to depart from the guidelines in Mr. McCuller's case.

[4] On the Sentencing Information Report, Mr. McCuller was placed in the C-IV cell, with guidelines of 10 to 28 months. [Appendix A]. But as a result of sustained objections at the sentencing proceeding, he was placed in the B-IV cell, with guidelines of 5 to 28 months. [Sent 6/17/03, pp 2-3].

[5] A "straddle cell" allows the imposition of either an intermediate sanction or a prison term. MCL 769.34(4)(c).

other type of weapon"; 1 point under Offense Variable 2, for "the offender possessed or used any other potentially lethal weapon"; and 25 points under Offense Variable 3, for "life threatening or permanent incapacitating injury occurred to a victim."

The crime of which Mr. McCuller was convicted requires proof of (1) attempt or threat with force or violence to do corporal harm to another, which is an assault; and (2) intent to do great bodily harm less than murder. *People v Parcha,* 227 Mich App 236; 575 NW2d 316 (1997); MCL 750.84. Thus, a verdict of guilt for this offense necessarily required proof of these elements, and nothing more.

It matters not that there may have been some evidence introduced at Mr. McCuller's trial related to the use of a weapon and the extent of the complainant's injuries, which could have supported a finding that he committed acts consistent with scoring Offense Variables 1, 2 and 3. In charging Mr. McCuller with this offense, the prosecutor did not request that the jury find that he committed such acts. In instructing the jury, the court did not charge the jury with finding that he committed any such acts. In convicting him, the jury did not specifically find proof beyond a reasonable doubt that he committed any such acts. Accordingly, the jury verdict did not authorize the assessment of these points, which were scored on the basis of factual findings by the judge. As Justice Scalia accurately and poignantly summed up the rule of *Apprendi v New Jersey,* 530 US 466; 120 SCt 2348; 147 L Ed 2d 435 (2000), the predecessor to *Blakely v Washington, supra*:

> The fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to the imposition of the level of punishment the defendant receives -- whether the statute calls them elements of the offense, sentencing factors, or Mary Jane -- must be found by the jury beyond a reasonable doubt. *Ring v Arizona,* 536 US 584, 610; 122 SCt 2428; 153 L Ed 2d 556 (2002) (Scalia, J. concurring).

The increase of Mr. McCuller's sentence beyond that which was authorized by the jury verdict violates his constitutional rights to due process and to a jury trial, according to the *Blakely* decision.

The United States Supreme Court decision in *Blakely v Washington, supra* was premised on its previous decision in *Apprendi v New Jersey, supra.* The defendant in *Apprendi* was convicted after pleading guilty to possession of a firearm for an unlawful purpose. He was given an enhanced sentence based on the trial judge's finding that he had committed his crime with the purpose of intimidating his victims because of their race. The Court deemed this enhancement of his sentence unconstitutional, as it was based on facts to which the defendant had not admitted when he took his plea.

In assessing whether a sentencing judge's factual findings can properly, and constitutionally, formulate the basis for an enhanced sentence, the *Apprendi* Court posed this critical question: "[t]he relevant inquiry is not one of form, but of effect - does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 530 US at 494. If, as in Mr. McCuller's case, the answer to this question is affirmative, then the resultant sentence is illegal. The guiding principle of *Apprendi* is that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 530 US at 490.

This principle was soundly reiterated in *Blakely v Washington,* where the Court invalidated a sentence which was increased based on factual findings by the judge. The *Blakely* Court stated that the maximum sentence that can be imposed "is the maximum sentence a judge may impose *solely on the basis of the facts reflected in a jury verdict or admitted by the defendant.*" *Id.* at

542 US at 303. The Court noted that had the judge imposed the sentence he imposed solely on the basis of the plea or verdict, he would have been reversed. *Id.* at 542 US at 304.

The same observation had previously been made by the Court in *Harris v United States,* 536 US 545; 122 SCt 2406; 153 L Ed 2d 524 (2002). The defendant in *Harris* raised an *Apprendi* challenge to a federal statute which required the sentencing judge to impose a mandatory minimum sentence if the judge found that the defendant had brandished a weapon during the commission of the conviction offense. A similar Pennsylvania statute had been upheld before *Apprendi,* in *McMillan v Pennsylvania,* 477 US 79; 106 S Ct 2411; 91 L Ed 2d 67 (1986), because the Court concluded that the judicial finding did not expose the defendant to greater punishment than was already defined by the statute, i.e. the trial court could have imposed the same sentence without the finding. The Court reached this same conclusion again *Harris,* stating that "the jury's verdict has authorized the judge to impose the minimum with or without the [judge's] finding." 477 US at 557. The consistent theme of these cases -- which clearly invalidates the sentence imposed on Mr. McCuller -- is that the Constitution does not permit a judge to impose a sentence which is more severe than could have been imposed solely on the basis of the jury verdict.

Just as in *Blakely,* and later *Booker v United States,* ___ US ___; 125 SCt 738; 160 L Ed 2d 621 (2005), where the Court reached the same result concerning the federal sentencing guidelines, Mr. McCuller's sentence is invalid because "the jury's verdict alone does not authorize the sentence." *Blakely,* 477 US at 305; *Booker,* 125 SCt 751.

Just as in *Blakely* and *Booker*, an intermediate sanction cell, where Mr. McCuller belongs, calls for a flat or "determinate" sentence, which cannot be increased based on judicial fact-finding.

The sentencing schemes invalidated in *Blakely* and *Booker* involved sentencing guidelines which set a range within which the judge selected a flat prison sentence. Once a defendant in those jurisdictions serves his sentence, he is released. *Blakely* and *Booker* stand for the proposition that it is unconstitutional to impose a sentence that is greater than the maximum within that range on the basis of judicial fact-finding. The *Blakely* Court noted that in *Apprendi* and *Ring v Arizona, supra,* "we concluded that the defendant's constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding." *Blakely,* 542 US at 303.

According to this Court's reasoning in *People v Claypool,* 470 Mich 715; 684 NW2d 278 (2004), the *Blakely* decision does not apply to the Michigan sentencing scheme because it differs from the Washington sentencing scheme treated in *Blakely* in critical ways. The Court noted that the Washington system only provided for a flat sentence, and as a result, the trial judge's enhancement increased the maximum sentence the defendant would actually serve. This Court concluded that this was what the *Blakely* Court meant when it held that judicial fact-finding is invalid when it increases a *determinate* sentence. (Opinion of Taylor, J., joined by Markman, J., at 730, n 14; Opinion of Cavanagh, J., at 741; Opinion of Weaver, J., at 744; Opinion of Young, J., at 744, n 1).

In contrast, this Court in *Claypool* continued, the guidelines in Michigan set a range from which the judge selects a minimum sentence, but the sentence the defendant actually serves is somewhere between that minimum sentence and the maximum sentence set by statute, based on subsequent determinations by the parole board regarding the defendant's eligibility to be

released. The argument opposing the applicability of the *Blakely* decision to the Michigan sentencing system holds that *Blakely* does not enjoin against judicial fact-finding which increases the minimum sentence imposed on a defendant, because the maximum sentence never changes. This Court in *Claypool* opined that this is what the *Blakely* Court meant when it held that judicial fact-finding does not offend the constitution when it increases an *indeterminate* sentence.

In sum, this Court in *Claypool* held that the *Blakely* decision has no effect on the Michigan sentencing scheme because Michigan has an indeterminate sentencing system, in which the minimum sentence is recommended by the guidelines but the maximum sentence is set by law and cannot be affected by the sentencing judge. In contrast, the Court reasoned, the Washington guidelines addressed in *Blakely* set a range for a flat or determinate sentence, which therefore constitutes the maximum sentence to be served.

The reasoning of the *Claypool* decision, therefore, turns on the definition of the concept of a "maximum sentence," as well as the interpretation of the terms "determinate" and "indeterminate." Mr. McCuller respectfully submits that *Claypool* is wrongly decided because in it this Court mistook the significance of "maximum sentence." The Court in *Blakely* held that the maximum sentence that can be imposed "is the maximum sentence a judge may impose *solely on the basis of the facts reflected in a jury verdict or admitted by the defendant*." *Id.* at 542 US at 303 [emphasis in original]. The Court further elaborated that:

> [T]he relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to punishment ... and the judge exceeds his proper authority. *Id.* at 303-304 [emphasis in original][citations omitted].

The central point of *Blakely* is that where a legislature has conditioned punishment on the finding of certain facts, judicial fact finding (and, therefore, the resultant sentence) is **without authority** because it intrudes on the province of the jury:

> [T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. **It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury.** *Id.* at 542 US at 308 [emphasis added].

The relevant facts in the instant case are indistinguishable from those presented in *Blakely.*

Mr. McCuller further posits that the reasoning of *Claypool* is flawed because it depends on an interpretation of the terms "determinate" and "indeterminate" which differs significantly from that which was employed by the Court in *Blakely.* In both *Blakely* and *Booker*, the United States Supreme Court uses the term "indeterminate" to refer to a sentencing scheme in which the judge has greater discretion, compared with "determinate" schemes, in which sentences are set by law. (See Opinion of the Court in *Blakely* by Scalia, J., at 542 US at 308-309, responding to the Opinion of O'Conner, J., at 542 US at 314-320, concerning the merits of a determinate system, which she describes as one with very limited judicial discretion; see also Opinion of the Court in *Booker* by Stevens, J. 125 SCt at 751).

It is a distortion, therefore, to extrapolate the *Blakely* reasoning to mean that *Blakely* does not apply to indeterminate sentencing schemes like Michigan's, since this is not what the United States Supreme Court meant when it described certain systems as indeterminate. Mr. McCuller disagrees with the *Claypool* decision and asserts that the *Blakely* decision invalidates all judicial fact-finding which increases the sentencing guidelines beyond that which is commensurate with the jury verdict or guilty plea in Michigan.

But regardless of whether *Blakely* invalidates judicial fact-finding which increases the sentencing guidelines in all instances, it is inescapable that it invalidates judicial fact-finding in cases like Mr. McCuller's, where the guidelines authorized by the jury verdict place the defendant in an intermediate sanction cell, which, if incarceration is imposed, requires a flat sentence, and which does not subject the defendant to imprisonment or release based on parole consideration.

That the *Blakely* decision governs cases like those of Mr. McCuller has already been conceded by Michigan prosecutors, who otherwise have consistently embraced the *Claypool* position. The application for leave to appeal in the instant case was originally held in abeyance pending issuance of a decision in *People v Drohan,* No 127489, which involved the application of the *Blakely* decision to the Michigan sentencing guidelines as a whole, i.e. not particularly to a defendant like Mr. McCuller who belongs in an intermediate sanction cell. Although it submitted an amicus Brief in *Drohan* opposing the applicability of *Blakely* to Michigan, the Prosecuting Attorneys Association of Michigan (PAAM) admitted in that same pleading that *Blakely* does concern determinate sentencing schemes [page 10], which it further defined as "a fixed sentence for a flat term, with no minimum or maximum" [page 6].

Likewise, the Oakland County Prosecutor, which is the Plaintiff-Appellee in this case, stated in its Brief in the *Drohan* that, "*Blakely v Washington* is inapplicable to the Michigan statutory sentencing guidelines because *Blakely* applies to determinate sentences and Michigan follows an indeterminate sentencing scheme" [page 4]. By even the prosecuting attorneys' definition, then, an intermediate sanction cell, such as the one in which Mr. McCuller belongs in the absence of additional judicial fact finding, is a determinate sentence which is governed by the *Blakely* case, even if no other sentencing scenarios in Michigan are so governed.

In cases like Mr. McCuller's -- in which the jury verdict compels a legislatively mandated "intermediate sanction" such as up to 11 months in jail -- departing from the guidelines range to impose a prison sentence (or scoring guidelines to reach a straddle or prison cell) based solely on judicial fact-finding clearly does increase the "statutory maximum" based on facts which were not found by the jury beyond a reasonable doubt. The *Blakely* Court noted that, "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment' ...and the judge exceeds his proper authority." *Id.* at 542 US at 304 [internal citations omitted]. This is precisely what occurs when an offender such as Mr. McCuller is entitled to an intermediate sanction based on the jury's finding, but instead receives a prison sentence based on judge-found facts.

This Court must remand Mr. McCuller for resentencing. For all similarly situated individuals, Mr. McCuller urges that this Court disallow the assessment of any Offense Variable points which are based on facts not decided by the jury or admitted by the defendant.

Mr. McCuller prays that the Court remand him to the trial court so that he may be given a sentence within his correct guidelines range of 0 to 11 months, i.e. an intermediate sanction.

To remedy the constitutional violation affecting all other similarly situated defendants, the Court should invalidate the assessment of any Offense Variable points which are based on facts that were not decided by the jury beyond a reasonable doubt or admitted by the defendant as the factual basis for a guilty plea. This remedy would cure the unconstitutional flaw emanating from sentence enhancement based on facts not proven beyond a reasonable doubt, while at the same time effectuating the clear intent of the Legislature in promulgating the

sentencing guidelines, which was to avoid sending to prison less culpable individuals who have committed less serious offenses.

Michigan's sentencing guidelines were specifically enacted to constrain and limit judicial discretion. And as the Court noted in *People v Garza,* 469 Mich 431, 434-435; 670 NW2d 662 (2003), one of the Legislature's key purposes in implementing the sentencing guidelines was "encouragement of the use of sanctions other than incarceration in the state prison system." Thus, the statute which created the sentencing guidelines commission that devised the guidelines charged that body with specifying "the circumstances under which a term of imprisonment is proper and the circumstances under which intermediate sanctions are proper." MCL 769.33 (1)(e)(v). [See 1994 Mich Pub Acts 445; see also *Sheila Robertson Deming, Michigan's Sentencing Guidelines*, 79 Mich B J 652, 653-654 (2000)].

If a prosecutor wants the trial court to assess points under the guidelines based on particular facts, then this Court should require that the aggravating factors be charged in the Information, and that the prosecutor request a special verdict indicating whether the jury has made the requisite findings beyond a reasonable doubt. For example, in a case such as Mr. McCuller's, the prosecutor would have to actually charge touching with weapon (OV 1), possessing or using a weapon (OV 2), and causing life threatening or permanently incapacitating injury (OV 3).

Alternatively, the Court should require that such facts be submitted to the jury in a separate proceeding after the verdict is rendered. Indeed, such a bifurcated system has been implemented by the Washington Legislature in the wake of *Blakely.*[6] The prosecution would simply file a Supplemental Information comparable to that which is used to charge habitual offender status. Trial on the base elements would proceed as normal, but on conviction, a

second, special verdict form would be submitted outlining further specific findings for the jury to make -- i.e. guidelines variable determinations and/or any appropriate grounds for departure. Should further testimony be required, the same jury could be retained to make the necessary findings as was done when there were formerly trials for habitual offender enhancement.

In *Blakely,* the United States Supreme Court expressly declared that its decision was intended not to invalidate sentencing schemes, but to provide direction regarding their proper implementation: "This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment." *Id.* at 542 US at 308. Thus, it is not the guidelines scheme itself that is unconstitutional, but a sentence under such a scheme which is based on facts that were not proven to a jury beyond a reasonable doubt. Nothing in Michigan's guidelines scheme precludes a jury from making the requisite findings of fact, and the statute can easily be implemented in future cases to comply with the constitution.

Indeed, in cases which had been pending on appeal when *Blakely* was decided, the Washington Courts severed the unconstitutional portions of its statute from those which were deemed unconstitutional in *Blakely. State v Hughes,* 153 Wash 2d 118, 132; 110 P 3d 192 (2005); *State v Harris,* 123 Wash App 906; 99 P 3d 902 (2004). In *Hughes,* the Court stated that to prove that the sentencing provisions of the statute were facially unconstitutional, the state must show that there was "no set of circumstances" in which the statute could be applied constitutionally." *Id.* at 154 Wash 2d at 133-134. That Court added that, "[h]olding a statute unconstitutional as-applied prohibits future application of the statute in a similar context, but the statute is not totally invalidated." *Id.* at 153 Wash 2d at 132. This comports with the United States Supreme Court's admonition that, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *United States v Buckland (en banc),* 289 F3d

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[6] Revised Code of Washington 9.94A.537, effective April 14, 2005.

558, 564 (CA 9, 2002), quoting *Hooper v California,* 155 US 648, 657; 15 SCt 207; 39 L Ed 297 (1895).

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

WHEREFORE, for the foregoing reasons, Defendant-Appellant Raymond Allen McCuller asks that this Honorable Court either remand for resentencing, or grant leave to appeal and remand for resentencing.

Respectfully submitted,

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